ELLIOTT & QUINN'S
TORT LAW

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Pearson

TWELFTH EDITION

Elliott and Quinn's Tort Law

Problems with the law on negligence arise in each one of its aims:

- compensating victims of harm;
- marking fault;
- deterring carelessness;
- spreading the costs of harm caused by carelessness;
- fulfilling these tasks quickly and fairly.

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Chapter 4
Negligence: psychiatric injury

This chapter discusses:

- What psychiatric injury means in negligence law
- When there is a duty of care regarding psychiatric injury
- Problems with the law on psychiatric injury.

Now that you have an overview of the elements of a negligence claim, we can return to the topic of duties of care, and look at the three areas that have become subject to special rules, starting with psychiatric injury. As we saw in Chapter 2, if someone negligently causes you a physical injury, there will usually be a duty of care. But what about if they cause you a mental injury, such as depression, or post-traumatic stress disorder? Here the courts have decided that there should be limits on claims, and as you know by now, the concept of a duty of care is one way to impose those limits.

In the past, where there was no physical harm the courts were slow to accept claims for mental, rather than physical, injury caused by negligence. Such claims are now recognised but are subject to a number of restrictions.

What is psychiatric injury?

Psychiatric injury is the term usually used in negligence cases to describe an injury that affects the mind, rather than the body, or a physical injury brought on by an effect on the mind. In earlier cases, it was often referred to as 'nervous shock', but this term is completely misleading. It seems to imply that claimants can seek damages because they are shocked at the result of a defendant's negligence, or perhaps upset, frightened, worried or grief-stricken. This is not the case. In order to claim for the so-called nervous shock (more properly called psychiatric injury), a claimant must prove that they have suffered from a genuine illness or injury. In some cases, the injury or illness may actually be a physical one, brought on by a mental shock: cases include a woman who had a miscarriage as a result of witnessing the aftermath of a terrible road accident (**Bourhill** *v* **Young** (1943), though the woman's claim failed on other grounds), and a man who was involved in an accident but not physically injured in it, who later suffered a recurrence and worsening of the disease myalgic encephalomyelitis (ME), also known as chronic fatigue syndrome, as a result of the shock (**Page** *v* **Smith** (1995)).

If the shock has not caused a physical injury or illness, the claimant must prove that it has caused what Lord Bridge in **McLoughlin** *v* **O'Brian** (1983) (see below) described as 'a positive psychiatric illness'. Examples include clinical depression, personality changes and post-traumatic stress disorder, an illness in which a shocking event causes symptoms including difficulty sleeping, tension, horrifying flashbacks and severe depression. It is important to be clear that this category does not include people who are simply upset by a shock, regardless of how badly; they must have a recognised psychiatric illness, and medical evidence will be needed to prove this. Consequently, we will use the term psychiatric injury from now on, though 'nervous shock' is referred to in many judgments.

Claimants who can prove such injury can only claim in negligence if they can establish that they are owed a duty of care by the defendant, with regard to psychiatric injury (and of course that the defendant's negligence actually caused the injury). This will depend on their relationship to the event that caused the shock, and case law has developed different sets of rules, covering different categories of claimant. The number of categories has varied at different stages of the law's development, but since the House of Lords case of **White and others** *v* **Chief Constable of South Yorkshire** (1998), there are now three:

- Those who are physically injured in the event that the defendant has caused, as well as psychiatrically injured as a result of it. These are called primary victims.
- Those who are put in danger of physical harm, but actually suffer only psychiatric injury. These are also called primary victims.

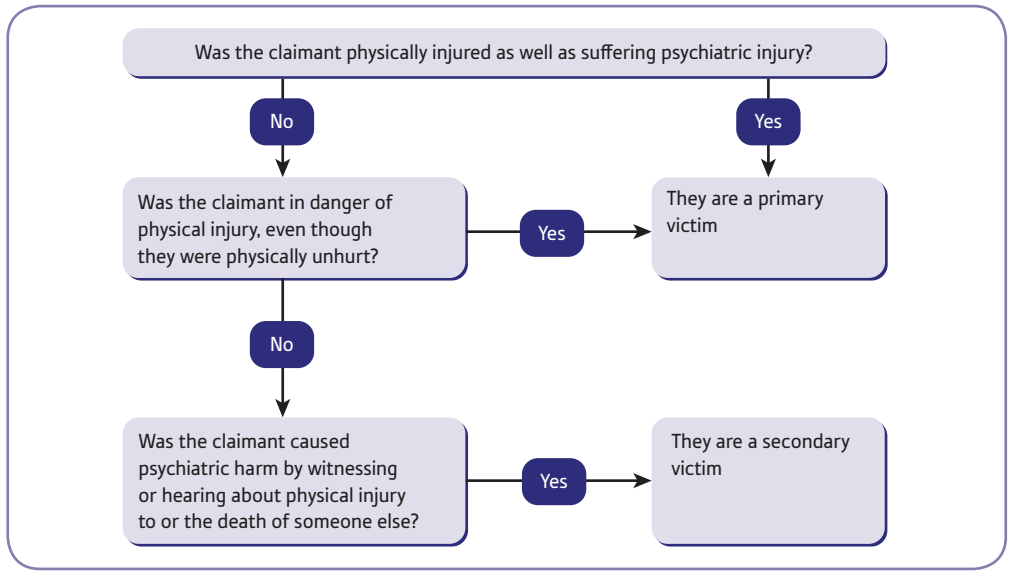

Figure 4.1 Primary and secondary victims in psychiatric injury claims

- Those who are not put in danger of physical injury to themselves, but suffer psychiatric injury as a result of witnessing such injury to others; these are called secondary victims. A duty of care to secondary victims will arise only if they can satisfy very restrictive requirements.

Primary victims

An accident victim who suffers physical injury due to the negligence of another can recover damages not just for the physical injuries but also for any psychiatric injury as well. The ordinary rules of negligence apply to such cases. The category of primary victims also includes those who are put at risk of physical injury to themselves, and who do not actually suffer physical injury but do suffer psychiatric injury as a result of the dangerous event. **White and others** (1998) confirms that if a person negligently exposes another to a risk of physical injury, they will be liable for any psychological injury that this exposure may cause the other person, even if the threatened physical injury does not in fact happen.

This was originally established by the case of **Dulieu** *v* **White & Sons** (1901). The claimant was serving in a pub when one of the defendant's employees negligently drove his van and horses into the premises. The claimant feared for her safety, and although she was not actually struck she was badly frightened and suffered a miscarriage as a result. The defendant was found liable even though there was no physical impact, as he could have foreseen that the claimant would have suffered such shock.

The leading modern case on primary victims who are exposed to the risk of injury, but not actually physically hurt, is **Page** *v* **Smith** (1995). The claimant was involved in an accident that could have caused physical injury, but fortunately he escaped unhurt. Some years earlier, he had suffered from a serious illness called myalgic encephalomyelitis. He had had this illness for several years but, before the accident happened, it had gone into remission. After the accident, his old symptoms began to recur, and he claimed that this had been caused by the shock of being involved in the accident. The House of Lords held that where it was reasonably foreseeable that a defendant's behaviour would expose the claimant to a risk of physical injury, there was a duty of care with

regard to any injury that the claimant suffered, including psychiatric injury. It was not necessary that psychiatric injury itself was foreseeable.

This approach was followed in **Simmons** *v* **British Steel plc** (2004). The claimant had been physically injured in a workplace accident, and as a result of his shock and anger at what had happened to him, he developed a severe skin condition. This led to him having to take a great deal of time off work and, as a result of that, he developed a depressive illness. The House of Lords held that the employers were liable for the skin condition and the depressive illness, as well as the original injury. They had exposed him to a foreseeable risk of physical injury, and they were therefore liable for all the injuries that resulted from that risk. It did not matter that the actual type of the injuries was not foreseeable.

Although a claimant can claim for psychiatric injury caused by fears for their own physical safety even though no physical injury actually occurred, there must be some basis for the fears. In **McFarlane** *v* **Wilkinson** (1997), the Court of Appeal held that the fear must be reasonable, given the nature of the risk and the claimant's situation. The case arose out of the terrible events on the *Piper Alpha* oil rig, when the rig caught fire and many people died as a result of the explosion. The claimant had been in a support boat about 50 yards from the rig and witnessed the disaster. His claim for the psychiatric injury suffered as a result was rejected by the Court of Appeal, on the ground that the boat he was on was clearly never in any danger, and so his fear for his safety was unreasonable. (For reasons that will be obvious when we look at the witness cases below, merely seeing the disaster would not have been sufficient ground for this claimant's claim.)

A very unusual case on the distinction between a primary and secondary victim is **Re & Others** *v* **Calderdale and Huddersfield NHS Foundation Trust** (2017). Due to negligence by the defendant's employees, the claimant suffered a horrendous labour, and when her daughter was born, she appeared to be dead, though in fact she survived. The experience caused the claimant post-traumatic stress disorder (PTSD), and the question for the court was whether she was a primary or a secondary victim. The negligence which caused the baby to appear to be dead happened when the baby's head had emerged, but the rest of her body was stuck in the birth canal, and in law, while a baby is still in its mother's womb, they are considered to be one person. Although the claimant's life was not in danger, her baby's life was, and therefore the court found that the mother was a primary victim.

The court also considered a claim from the baby's grandmother, who was present at the birth, and also suffered PTSD as a result of believing the baby was dead. Her claim was allowed as a secondary victim: she had directly witnessed a horrifying event, and she had a close relationship with the primary victim.

One issue that is unclear is whether a claimant can be considered a primary victim if they were not actually in physical danger, but had reasonable grounds for thinking that they might be. The two leading judgments in **White** differ slightly in this area: Lord Steyn says the claimant must have 'objectively exposed himself to danger or *reasonably believed* that he was doing so' (our italics); on the other hand, Lord Hoffmann refers only to primary victims being 'within the range of foreseeable physical injury'. Of course, in the majority of cases the reasonable belief that the claimant was in danger will arise from the fact that they actually were; but, in the throes of an emergency situation, it is not difficult to imagine making out a case for believing oneself to be in some danger when in fact there is no physical risk at all, and it is a pity that their Lordships did not make themselves clearer on this crucial point.

In **CJD Group B Claimants** *v* **The Medical Research Council** (1998), it was suggested that there might be a group that could not be considered primary victims in the usual sense, but who nevertheless should be treated in the same way. The claimants in the case had all had growth problems as children, and they had been treated with injections of growth hormone that, it was later discovered, may have been contaminated with the virus that causes Creutzfeldt–Jakob disease

(CJD), a fatal brain condition. It was established that those who had received the contaminated injections were at risk of developing CJD, but it was not possible to discover which batches had been contaminated, nor to test the recipients to discover whether a particular individual was harbouring the virus. As a result, the claimants were having to live with the fear of knowing that they might develop the disease, and some of them suffered psychiatric injury as a result of this.

It was established that the defendants had been negligent in allowing the injections to continue after the risk of contamination was suspected, and the claimants claimed that they were owed a duty as primary victims with regard to psychiatric injury, as the injections they were negligently given made them more than mere bystanders, and could be compared to the car accident in which the claimant in **Page** *v* **Smith** was involved. Morland J disagreed with this analysis, holding that they were not primary victims in the normal sense, because the psychiatric injury was not actually triggered by the physical act of the injections, but by the knowledge, which came later, that they might be at risk of developing CJD. Even so, he allowed their claim, on the basis that there was a relationship of proximity between the parties, that the psychiatric injuries were reasonably foreseeable, and there was no public policy reason to exclude them from compensation.

However, this approach was not followed in the case of **Rothwell** *v* **Chemical & Insulating Co Ltd** (2007). The claimants in the case were a group of workers who had been negligently exposed to asbestos while working for the defendants. If asbestos gets into the lungs, it can cause one of a range of fatal diseases. At the time the case was brought, none of the defendants had any of these diseases, but they did have what are known as pleural plaques. These are a form of scarring on the lungs, which shows that asbestos has been inhaled. The plaques do not cause any symptoms, or make it more likely that the person will get one of the asbestos-related illnesses, but, because they are evidence that asbestos has entered the person's lungs, having them is a sign that that person may be at risk of asbestos-related illness. This naturally caused great anxiety among the claimants, but, as we have seen, this is not enough to make a claim for psychiatric injury. However, one of the claimants had gone on to develop clinical depression, which is a recognised psychiatric illness, as a result of the worry, and so the House of Lords had to consider whether the defendants owed him a duty of care with regard to psychiatric illness. They held that there was no duty of care in this case, stating that the question should be decided on the usual principles applicable to psychiatric illness caused at work (see Chapter 7). On this basis, the defendants could not reasonably have been expected to foresee that the claimant would suffer a psychiatric illness as a result of exposure to asbestos, so there was no duty of care and his claim failed.

Secondary victims

Until **White**, each of these groups had been subject to different treatment, but **White** establishes that they are all to be subject to the same rules, namely those developed in two key cases, **McLoughlin** *v* **O'Brian** (1982) and **Alcock** *v* **Chief Constable of Yorkshire** (1992). These cases established that secondary victims could only claim for psychiatric injury in very limited circumstances, and **White** confirms these limitations.

In **McLoughlin** *v* **O'Brian**, the claimant's husband and children were involved in a serious car accident, caused by the defendant's negligence. One of her daughters was killed and her husband and two other children badly injured. The claimant was not with her family when the accident happened, but was told about it immediately afterwards, and rushed to the hospital. There she saw the surviving members of her family covered in dirt and oil, and her badly injured son screaming in fear and pain. She suffered psychiatric injury as a result, including clinical depression and personality changes.